No. ___ (1)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

DON LEE DISTRIBUTOR, INC. (WARREN); DON LEE DISTRIBUTOR, INC. (DEARBORN); POWERS DISTRIBUTING COMPANY, INC.; EASTOWN DISTRIBUTORS, CO.; HUBERT DISTRIBUTORS, INC.; and OAK DISTRIBUTING CO.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondents.*

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1038,

Intervenor.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

ROSEMARY M. COLLYER
COUNSEL OF RECORD
TERENCE F. FLYNN
ANDREW W. BAGLEY
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 624-2500

Attorneys for Petitioners

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QUESTION PRESENTED FOR REVIEW

Whether the Sixth Circuit correctly held that an initial fraudulent concealment excuses later inaction and tolls Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), without regard to the aggrieved party's actual state of knowledge or diligence in pursuing its rights.

PARTIES TO THE PROCEEDINGS

This case arises from a judgment of the United States Court of Appeals for the Sixth Circuit denying a petition for review of an order of the National Labor Relations Board and granting the Board's cross-application for enforcement. The only parties are those identified in the caption. Petitioners are all privately held companies and have no publicly traded parent companies or subsidiaries.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, *1998*

DON LEE DISTRIBUTOR, INC., *ET AL.*,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondents.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1038,

Intervenor.

PETITION FOR WRIT OF CERTIORARI

Petitioners, Don Lee Distributor, Inc. (Warren), Don Lee Distributor, Inc. (Dearborn), Powers Distributing Company, Inc., Eastown Distributors Company, Hubert Distributors, Inc., and Oak Distributing Company, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on June 2, 1998.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is officially reported in 145 F.3d 834 and appears herein as Appendix ("App.") A, *infra*, at pp. 1a-23a. The decision and order of the National Labor Relations Board are reported at 322 N.L.R.B. 470 and appear herein as App. A, *infra*, at pp. 24a-39a. The decision of the NLRB incorporates in full the Administrative Law Judge's ruling (App. A, *infra*, at pp. 40a-105a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1998. App. A, *infra*, at p. 2a. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on July 10, 1998 (App. B., *infra*, at pp. 106a-107a). This Court has jurisdiction under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b) (1988), provides:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . .

STATEMENT OF THE CASE

This case presents important questions regarding the scope of the "fraudulent concealment" doctrine in the context of Section 10(b) of the NLRA. The court of appeals established a new standard that permits the limitations period to be tolled without regard to the aggrieved party's actual state of knowledge or diligence in pursuing its rights. The issue is one of recurring importance in the enforcement of federal labor laws and has never been addressed by the Court. The split in the circuits warrants Court review now.

A. Background and Facts

1. Course of Bargaining

The Petitioners are six wholesale beer distributors operating in the Detroit, Michigan area, whose drivers have been represented by Local 1038 of the International Brotherhood of Teamsters (the "Union") for many years and many contracts. App. 41a-42a. In 1990, Petitioners withdrew from a multiemployer bargaining association and agreed to representation by West Coast Industrial Relations Association, Inc. ("West Coast") in bargaining for a new contract. *Id.*. Petitioners sought to coordinate their bargaining efforts in order to increase their bargaining power relative to the union.[1] App. 3a-4a. Guided by West Coast, they signed a mutual aid pact ("Pact") in January 1990. App. 44a-48a. The Pact called for sharing fees and expenses and identified 22 minimum bargaining objectives. App. 45a-48a. In addition, it provided that the objectives could be changed by majority vote, and specified that any distributor which breached the agreement, negotiated directly with the Union, or settled on terms in excess of the stated objectives would be liable for a penalty fee to each of the other distributors.

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[1] In multiemployer bargaining, two or more employers negotiate a single contract to cover all of them. Multiemployer bargaining requires union agreement because it merges the employees of all member employers into a single bargaining unit. The resulting contract is then ratified by a single vote among covered employees. In coordinated bargaining, there is no merger of separate bargaining units. Rather, a group of unions or employers coordinate their strategies – which may extend to insistence on similar contract terms – but negotiate separate contracts for separate units of employees. *See generally* Hensley and Jansonius, *The Interaction of Federal Labor and Antitrust Policies: An Analysis of the Legality of Coordinated Collective Bargaining by Employers*, 40 Southwestern L. J. 967 (1986); *see also* App. 66a-67a.

On March 27, 1990, Petitioners and the Union held an initial meeting during which West Coast's president, Fred Long, gave the Union's president and chief negotiator, Robert Knox, a memorandum which stated that Petitioners would engage in coordinated bargaining and that their bargaining positions and proposals would be essentially the same. App. 6a. Knox immediately asked if Petitioners had entered into any kind of mutual aid pact. App. 7a. Long answered that they had an "understanding," but stated that he was instructing his clients not to respond because it was not a relevant subject for bargaining, so Knox could take his answer as "no response." App. 53a-54a. Knox asked if any distributor could use a negotiator other than West Coast and Long said that they could. App. 22a.

Knox continued to inquire about any agreement among Petitioners. In one form or another, the issue was raised five times between April and September 1990. App. 53a-54a. On each occasion, West Coast told him it was "none of [his] business" or refused to respond. *Id.* At a bargaining session on September 20, 1990, Knox directly asked two distributor representatives whether there were "a written or oral document that binds you distributors together in any way," and was told there was not. App. 9a, 54a.

Months of negotiations were unsuccessful. Petitioners three times filed unfair labor practice charges against the Union which the General Counsel found to have merit. Specifically, the General Counsel found that the Union failed to provide information necessary for bargaining, engaged in surface bargaining and dilatory tactics, and continued surface bargaining in individual negotiations with one of the distributors. App. 108a-114a. The Union settled each charge informally with the National Labor Relations Board ("NLRB" or "Board") and pledged to bargain in good faith. *Id.*

Petitioners announced a negotiating impasse in September 1990. App. 9a-10a. After further negotiations, they implemented the non-economic proposals of their final offers on February 7, 1991, and the economic terms of their offers on April 15, 1991. *Id.*

On April 3, 1991, the Union filed an unfair labor practice charge which alleged that the February 1991 implementations had preceded a good-faith impasse.[2] App. 11a-12a. The charge alleged only "bargaining in bad faith" and did not specify that the Union was also alleging unlawful nonconsensual multiemployer bargaining. App. 11a-12a. In its investigation, the Region asked no questions and requested no documentation relating to the alleged multiemployer bargaining. Petitioners learned that the charge included allegations of multiemployer bargaining without consent when the charge was dismissed on June 20, 1991. App. 12a.

After the dismissal, complaint issued on July 26, 1991 concerning two aspects of Petitioners' February 1991 implementations.[3] App. 13a. The complaint was amended to challenge implementation of the economic proposals in

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[2] An impasses occurs "after good-faith negotiations have exhausted the prospects of concluding an agreement." *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1977). Any employer may then make unilateral changes that are substantially consistent with its last offer. *Atlas Tack Corp.*, 226 N.L.R.B. 222, 227 (1976), *enf'd*, 559 F.2d 1201 (1st Cir. 1967). Implementation prior to a bona fide impasse violates sections 8(a)(1) and (5) of the Act, 29 U.S.C. § § 158(a)(1) and (5) (1988). *See, e.g., NLRB v. U.S. Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993).

[3] The Region challenged the longer probationary period for new employees and a new classification of "casual" employees that were part of the terms implemented by the Petitioners in February 1991. App. 48a-49a.

April 1991. *Id.* The Union appealed the dismissal of its charge of unlawful multiemployer bargaining. *Id.*

At the same time, by mid-June 1991, the Union was certain that Petitioners were bound by a written agreement. Specifically, Knox testified:

> It was just a meeting or two before [a bargaining session on July 12, 1991] . . . And I thought to myself, you know, with the offer we have on the table . . . why don't we get an agreement with Eastown. . . . And it was very clear to me that they just could not make the decision for themselves. They were, in fact, you know --- well, marching in lock step . . . . So I figured they had to have some sort of document that bound them together.

App. 121a-122a.

At the July 12, 1991 bargaining session, a Union attorney demanded a copy of any agreement between Petitioners. App. 54a. In response, West Coast explicitly told the Union that there was a written pact. *Id.* West Coast confirmed the existence of the Pact in a July 16, 1991 letter to the Union, stating that Petitioners would be prepared to show the Pact to the Union if the Union could demonstrate its relevance and supply "case authority" requiring its production. App. 54a-55a. The Union never provided any legal authority in support of its request and Petitioners did not give them a copy of the Pact. *Id.* The Union failed to notify the General Counsel of this new evidence to support its pending charge or to seek a Board subpoena for the document.

On July 6, 1992, Long wrote to the General Counsel's Office of Appeals. Long's statement of position referenced the Pact and argued that Petitioners had not

violated the law but only engaged in lawful coordinated bargaining. App. 49a-50a. The General Counsel failed to question or pursue the matter further and never requested a copy of the Pact before sustaining the dismissal of the charge on July 28, 1992.

On November 16, 1992, pursuant to a trial subpoena, Petitioners produced the Pact. App. 14a. More than three months later, on February 18, 1993, the General Counsel was allowed to revive the multiemployer bargaining allegations that had been first dismissed in June 1991 and then again in July 1992. App. 12a-14a. The amended complaint alleged that the Pact created "a de facto multi-employer association and/or bargaining coalition." App. 50a.

2. The Board's Decision

After a lengthy hearing, an Administrative Law Judge ("ALJ") of the Board found that the Pact created a multiemployer bargaining group without Union consent. App. 84a. He concluded that the resuscitation of the April 1991 charge in February 1993 was not time barred by Section 10(b) because the distributors "fraudulently concealed" the Pact. App. 57a. As the last act of concealment to the Union, the ALJ cited the September 20, 1990 bargaining session at which two distributor representatives had denied that there was a pact. App. 54a. The ALJ also acknowledged, however, that Petitioners later explicitly told the Union that the Pact existed on July 12, 1991. *Id.* And, while he disapproved of Petitioners' failure to reveal the terms of the document to the Union, the ALJ was unable to locate any authority imposing such a duty upon them. App. 55a. ("I have substantial doubt that the Union would be entitled to complain of Long's refusal to produce [the Pact].").

The ALJ did not address the Union's bad faith bargaining, reasoning that in light of his finding that Petitioners' bargaining was unlawful from its inception, "[n]othing the Union did or failed to do makes any difference." App. 85a.

As to the General Counsel's inaction, the ALJ stated that Long's letter to the Office of Appeals, which the ALJ equated to the denial of an unfair labor practice, should prompt the Board to change its standard for fraudulent concealment and to find that such a denial constitutes fraudulent concealment. App. 56a n.6. ("Perhaps the time is ripe for the Board to reconsider its past reluctance to consider denials as constituting sufficient acts of concealment that might extend the 10(b) period."). The Board (and the Sixth Circuit) did not accept or address the ALJ's suggestion on changing the law. Instead, the Board affirmed the ALJ with a single statement: "[A]s the judge found, the amendment [to the General Counsel's complaint] was appropriate for the additional reason that the Respondents' fraudulent concealment *of the existence of the pact* tolled the 10(b) period." App. 30a (emphasis added).[4]

Both the ALJ and Board alternatively held that the "closely related" doctrine provided a basis for reviving the allegations of unlawful multiemployer bargaining notwithstanding the strictures of Section 10(b). App. 29a-

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[4] In addition, the Board agreed with the ALJ that Petitioners had not violated the Act with their probationary employee proposal. It declined to rule on the alleged violation relating to casual employees. App. 29a. Other aspects of the complaint, relating to specific implemented terms, were sustained.

30a, 50a-53a. Petitioners do not challenge this holding here, but the closely related doctrine does not justify the decision below.[5]

3. The Decision of the Sixth Circuit

On appeal, the circuit court agreed that "the facts could scarcely be stronger in support of the NLRB's finding of fraudulent concealment." App. 21a. It applied the test that "[f]raudulent concealment of a material fact underlying an unfair-labor-practice charge tolls the six-month limitations period." *Id.* Consistent with this two-part standard, it dismissed as "border[ing] on the disingenuous" Petitioners' arguments that the Union failed to exercise diligence in pursuing its rights. App. 22a.

The decision identified various acts of concealment from the Union that the court of appeals deemed sufficient to toll Section 10(b), the last one of which occurred in September 1990.[6] Specifically, it cited the fact that in an NLRB unit clarification proceeding involving only one distributor and before negotiations began, the Pact was not

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[5] The closely-related doctrine, which allows related allegations to be added to a timely charge, does not permit the finding of a violation based upon conduct which occurred more than six months before the filing of a timely charge. App. 29a-30a. Thus, application of the doctrine limits the relevant time period to six months before April 3, 1991, *i.e.*, October 3, 1990. The Board never conducted such an analysis here, App. 29a-30a, although the law is clear that one party's bad faith may excuse the other's. App. 23a. *See Local 777, Democratic Union Organizing Comm. v. NLRB*, 603 F.2d 862, 911 (D.C. Cir. 1978) (union's bad faith may excuse the employer's obligation to bargain); *Chicago Tribune Co.*, 304 N.L.R.B. 259, 260 (1991) (same). A remand for that analysis will be necessary.

[6] Like the Board, the court of appeals did not accept or address the ALJ's alternative suggestion that the law be changed to deem the denial of an unfair labor practice "fraudulent concealment."

produced in response to a Union subpoena to which it would have been responsive. App. 21a; *see* App. 54 n.5. The court also cited Long's "flagrant[ ] misrepresent[ation]" of the Pact's terms at the first negotiating session on March 27, 1990,[7] App. 22a, and Petitioners' "generally evasive" responses when asked about the existence of the Pact. App. 21a. In particular, the court cited to Long's statement to Knox that the existence of a pact was "none of his business," at the second bargaining session on April 18, 1990. App. 21a, 54a. The court also relied upon the September 20, 1990 statement by two distributor representatives that no mutual aid pact existed. *Id.* In addition, the court faulted Petitioners for failing to voluntarily produce the Pact during the General Counsel's investigation. App. 21a.

The decision recognized that West Coast had disclosed the existence of "some kind of agreement early in the negotiations." App. 10a n.3. It did not address the oral and written confirmations of the existence of the Pact in July 1991. Rather, the decision found "the disclosure of the *existence* of the Pact . . . immaterial . . . [because] the question is whether the Distributors disclosed the *terms* of the Pact." *Id.* (emphases in original).

As a result of this analysis, the court of appeals enforced the Board's order.

REASONS FOR GRANTING THE WRIT

This case presents the question of whether the "fraudulent concealment" exception to Section 10(b) is limited to instances in which a charging party exercises

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[7] The court cited to page 1674 of the Joint Appendix, which concerns testimony about the bargaining notes of a distributor representative from the March 27, 1990 session.

reasonable diligence in its own behalf or whether, as found by the court below, an early concealment excuses later inaction without regard to the aggrieved party's actual state of knowledge or diligence in pursuing its rights. The decision of the court of appeals has created an unprecedented and broad standard for tolling Section 10(b), which is inconsistent with the legal standard applied in all other circuits and contrary to guidance from this Court regarding applicability of the fraudulent concealment doctrine to all federal statutes. By absolving a charging party of its obligation to act within six months of notice of a potential violation, the decision effectively eliminates the congressionally-mandated statute of limitations in cases where material information was concealed at any time.

Because Section 10(b) applies to every unfair labor practice charged under the NLRA, and is imported for other causes of action under federal labor law, the decision has broad implications for a recurring and important issue affecting the administration and enforcement of federal labor laws. Review by this Court is warranted.

1. Section 10(b) of the NLRA prohibits litigation of purported unfair labor practices that occurred more than six months prior to the filing and service of a charge. *Machinists Local Lodge No. 1424 (Bryan Manufacturing) v. NLRB*, 362 U.S. 411, 416, 424-25 (1960). *Bryan Manufacturing* identified the congressional imperatives underlying the choice of such a short limitations period, namely "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused' . . . and . . . to stabilize existing bargaining relationships" in furtherance of industrial peace. *Id.* at 419 (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., p.40). "As expositor of the national interest, Congress, in the judgment that a six month limitations period did 'not seem unreasonable,' . . . barred the [National Labor Relations]

Board from dealing with past conduct after that period had run, even at the expense of the vindication of statutory rights." *Id.* at 429. "[T]he intended purpose of [Section 10(b)] is that, in the absence of a properly served charge on file, a party is assured that on any given day its liability under the Act is extinguished for any activities occurring more than six months before." *Chemung Contracting Corp.*, 291 N.L.R.B. 773, 774 (1988).

In *Ducane Heating Corp.*, 273 N.L.R.B. 1389 (1985), *enf'd without opinion*, 785 F.2d 304 (4th Cir. 1986), the Board interpreted Section 10(b) to bar the reinstatement of a dismissed charge outside the six-month limitations period. However, the Board announced that it would toll the limitations period when "a respondent fraudulently conceals the operative facts underlying the alleged violation" and would begin it again when "the charging party knows or should have known of the concealed facts." *Id.* at 1390. In effect, *Ducane* "borrowed the federal doctrine of fraudulent concealment, which is an 'equitable doctrine read into every federal statute of limitations.'" *Truck Drivers & Helpers Local 170 v. NLRB (Girardi Distributors)*, 993 F.2d 990, 995 (1st Cir. 1993) (*quoting Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)).

The Board and the D.C. Circuit have slightly refined the *Ducane* analysis in a series of decisions in which the Board abandoned "operative facts" and adopted the "material

facts" standard set forth by that circuit in *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977).[8]

However, until the ruling here, the scope of the fraudulent concealment doctrine under Section 10(b) has consistently been limited to cases where the charging party could prove that it did not know, and *could not have known*, of its potential claim more than six months before the filing or revival of its charge. *Brown & Sharpe II*, 50 F.3d 1088; *Girardi Distributors*, 993 F.2d 990; *NLRB v. O'Neill*, 965 F.2d 1522 (9th Cir. 1992), *cert. denied*, 509 U.S. 904 (1993); *Landry v. Airline Pilots Assoc. Int'l*, 901 F.2d 404 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990). *See also Hobson v. Wilson*, 737 F.2d 1, 35 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) ("the doctrine of fraudulent concealment does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim.")

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[8] *Brown & Sharpe Mfg. Co.*, 299 N.L.R.B. 586 (1990), *remanded sub. nom. District Lodge 64 v. NLRB*, 949 F.2d 441 (D.C. Cir. 1991) (*Brown & Sharpe I*), *on remand, Brown & Sharpe Mfg. Co.*, 312 N.L.R.B. 444 (1993), *remanded sub. nom., Machinists District Lodge 64 v. NLRB*, 50 F.3d 1088 (D.C. Cir. 1995) (*Brown & Sharpe II*), *on remand, Brown & Sharpe Mfg. Co.*, 321 N.L.R.B. 924 (1996), *aff'd, Int'l Ass'n of Machinists and Aerospace Workers, District Lodge 64 v. NLRB*, 130 F.3d 1083 (D.C. Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 2319 (1998) (*Brown & Sharpe III*).

In *Brown & Sharpe II*, the Board noted that "[b]y embracing *Holmberg*, we do not necessarily adopt all the glosses on the fraudulent concealment doctrine set forth by various Federal courts." 312 N.L.R.B. at 444, n.5. With circuit court approval, one of the "glosses" the Board has declined to adopt is the theory of a self-concealing wrong enunciated in *Hobson v. Wilson*, 737 F.2d 1, 35 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). *See Girardi Distributors*, 993 F.2d at 997-98. Rather, the party seeking to toll Section 10(b) bears the burden of proof on all elements of the fraudulent concealment doctrine, including proof of an "affirmative act" of concealment. *Id.*

2. It is firmly established in all circuits but the Sixth that a charging party seeking to avoid Section 10(b) must prove that it exercised reasonable diligence in enforcing its rights. Inspired by this Court's guidance in cases such as *Armbrecht*, *supra*, the circuits use a three-part analysis, requiring (1) deliberate concealment of (2) material facts which (3) the aggrieved party does not know and could not have discovered through reasonable diligence. *Brown & Sharpe II*, 50 F.3d at 1092 ("'deliberate concealment of material facts' tolls the statute until the plaintiff discovers or with due diligence should have discovered the basis of the lawsuit."); *Girardi Distributors*, 993 F.2d at 995 ("the limitations period is tolled when 'a respondent fraudulently conceals the operative facts underlying the alleged violation' . . . [but] will begin to run anew when 'the charging party knows or should have known of the concealed facts.'"); *Landry v. Airline Pilots Assoc. Int'l*, 901 F.2d at 412-13 ("Allegations of fraudulent concealment do not free plaintiffs of their obligation to exercise reasonable diligence to discover frauds perpetrated against them once they are on notice that such acts might have occurred."); *NLRB v. O'Neill*, 965 F.2d at 1527 (reinstatement appropriate "because the unions themselves were diligent in filing and investigating their charges").

The decision below creates a new standard that eliminates the need to exercise – much less prove – reasonable diligence. Its test consists only of "[f]raudulent concealment of a material fact underlying an unfair-labor-practice charge." App. 21a. The court of appeals ignored the Union's suspicions, which reached a point of certainty by June 1991, that Petitioners "had to have some sort of document that bound them together" that prevented them from "mak[ing] the decision for themselves," App. 122a, and ignored Petitioners' oral and written notices to the Union in July 1991 that the Pact existed. The Union here did not

investigate, did not report its knowledge to the General Counsel, and did not pursue a copy of the Pact, even though it could easily have done so by asking the General Counsel to obtain a copy of the document while the charge was pending and before it was finally dismissed in July 1992. *See North American Rockwell Corp. v. NLRB*, 389 F.2d 866, 872 (10th Cir. 1968) ("The courts have universally recognized the General Counsel's authority under Section 11(1) to compel disclosure of evidence by persons charged with violations of the Act in advance of the unfair practice hearing.") (citations omitted).

In light of these uncontested facts, the Union failed to exercise reasonable diligence as a matter of law. The court's holding that Section 10(b) could nonetheless be tolled squarely conflicts with the principle that a party cannot sit on its hands once it has notice of a potential violation. *John Morrell & Co.*, 304 N.L.R.B. 896, 900 (1991), *aff'd, United Food & Commercial Workers Union v. NLRB*, 998 F.2d 7 (D.C. Cir. 1993) (Section 10(b) runs when a party suspects or should have suspected an unlawful scheme; a charging party cannot wait for documentary proof). *See also Girardi Distributors*, 993 F.2d at 999 (charging party cannot wait for a "smoking gun").

Contrary to the decision, fraudulent concealment alone does not absolve an aggrieved party from its duty to exercise reasonable diligence. In order to toll the statute of limitations, the concealment must actually prevent the aggrieved party from obtaining notice of a potential violation. *See, e.g., Landry*, 901 F.2d at 412-13; *Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988), ("a plaintiff who has learned of facts which would cause a reasonable person to inquire further must proceed with a reasonable and diligent investigation, and is charged with knowledge of all facts such an investigation would have disclosed."). The Union is charged with full knowledge of the Pact as a matter

of law because it simply failed to act in the face of the existing evidence of a potential violation.

3. Apparently cognizant of the foregoing principles, the court of appeals attempted to excuse the Union's inaction by finding fraud in Petitioners' concealment of the "terms of the Pact," rather than its existence. App. 21a; *Compare* App. 30a. ("[F]raudulent concealment of the existence of the pact tolled the 10(b) period."). The court of appeals, however, relies exclusively on acts of concealment that occurred before the end of September 1990, before the Union observed the Petitioners' bargaining conduct, before it filed its unfair labor practice charge, and before it learned that Petitioners had a signed Pact which governed their relationship. *See* pp. __-__, *supra*.[9] In particular, the decision accused "Long and his associates [of] flagrantly misrepresent[ing] the Pact's terms." App. 22a. However, the basis for the court's accusation rests on testimony regarding statements made *at the first day of negotiations* in March 1990.[10] In effect, the court held that after an initial concealment, the statute of limitations starts to run only when an aggrieved party has detailed *proof* of its claim, not merely notice of its potential existence. This holding represents a radical departure from existing law.

Heretofore, the courts of appeals have agreed that Section 10(b) starts running when a claimant is on "inquiry notice," despite any prior concealment of material facts. *See*

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[9] In addition, the court below erred in blaming Petitioners for not turning over a copy of the Pact to the General Counsel. App. 21a. It is clear that Petitioners had no duty to turn over the Pact to the General Counsel or even to cooperate in the General Counsel's investigation. *See Brown & Sharpe III*, 130 F.3d at 1087-88.

[10] The court cited to J.A. 1674, *see* App. 118a, which reflected testimony concerning bargaining on March 27, 1990, at which "'Fred [Long] said they can retain someone else without penalty.'"

Girardi Distributors, 993 F.2d at 998 (*"Irrespective of the extent of the effort to conceal*, the fraudulent concealment doctrine will not save a charging party who fails to exercise due diligence, and is thus charged with *notice* of a potential claim.") (emphases added); *Brown & Sharpe I*, 949 F.2d at 449 (concealment tolls Section 10(b) until a charging party "discovers or with due diligence should have discovered the basis" of its charge); *Landry v. Airline Pilots Assoc. Int'l*, 901 F.2d at 412-13 ("Allegations of fraudulent concealment do not free plaintiffs of their obligation to exercise reasonable diligence to discover frauds perpetrated against them once they are *on notice* that such acts might have occurred.") (emphasis added); *see also Jensen v. Snellings*, 841 F.2d at 607 (plaintiff remains on "inquiry notice" even if defendants engaged in acts of concealment); *Hobson v. Wilson*, 737 F.2d at 35 (efforts to conceal irrelevant if a party is on notice of his claim).

Consistent with the standard applied by other circuits, the limitations period of Section 10(b) should have started running in this case in June or July 1991, more than nineteen months before the charge was reinstated. Union president Knox admitted that as of June 1991 he was certain that there was a "document that bound [Petitioners] together" and forced them to "march[ ] in lock step." App. 122a. On July 12, 1991, Knox received confirmation that such a written agreement existed. App. 54a. Section 10(b) thus expired no later than January 1992. *See Gardner v. International Telegraph Employees, Local No. 9*, 850 F.2d 518, 523 (9th Cir. 1988) (per curiam) ("[t]here was no concealment of the fact that a contract existed and that the Union would not give him a copy.").

Simply put, the Sixth Circuit's interpretation of the fraudulent concealment doctrine is plainly in error and casts doubt on the viability of Section 10(b)'s intentionally short time period. The Court should reaffirm the importance of

the "reasonable diligence" requirement and clarify the level of knowledge that is required to trigger Section 10(b): must a party act within six months of "inquiry notice" of a violation (as in all other circuits) or only, as here, when it has explicit documentary proof of the alleged violation?

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded so that an analysis accounting for both parties' bargaining conduct during the proper time frame can be conducted.

Respectfully submitted,

ROSEMARY M. COLLYER
COUNSEL OF RECORD
TERENCE F. FLYNN
ANDREW W. BAGLEY
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 624-2500